U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: MAY 0 2 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Acting Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner provides information technology consulting services. It seeks to employ the beneficiary permanently in the United States as a senior software engineer pursuant to section 203(b)(2)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2)(A).[1] As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the United States Department of Labor (DOL), accompanied the petition.[2]

Upon reviewing the petition, the acting director determined that the petitioner failed to establish that the beneficiary possessed the minimum level of education stated on the labor certification. Specifically, the director determined that the petitioner did not demonstrate that the beneficiary possessed a U.S. Master of Business Administration degree or a foreign equivalent degree as of the petition's priority date.

On appeal, counsel submits a new credentials evaluation with supporting documentation and argues that the beneficiary's two-year Master of Business Administration (MBA) degree after completion of a three-year Bachelor of Commerce degree constitutes a foreign degree equivalent of a U.S. MBA. As will be discussed, the AAO does not find the petitioner's evidence and arguments sufficient to establish that the beneficiary's educational qualifications meet the minimum level of education required for the offered position.

The record shows that the appeal is properly filed, timely, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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[1] The petitioner indicated on its Form I-140, Immigrant Petition for Alien Worker, that it sought to classify the beneficiary as a professional or skilled worker under section 203(b)(3) of the Act, 8 U.S.C. § 1153(b)(3). The record shows that the acting director, upon the petitioner's written request before final adjudication, amended the classification sought to advanced degree professional under section 203(b)(2)(A) of the Act.

[2] The DOL approved the labor certification for a worksite in [redacted] New Jersey. The petitioner notified USCIS that it has since moved to [redacted] New Jersey. Because both communities are in the same Metropolitan Statistical Area (MSA), however, the labor certification remains valid. *See* 20 C.F.R. §§ 656.3, 656.30(c)(2) (explaining that relocation of the job opportunity outside the "area of intended employment" stated on a labor certification invalidates the certification, and defining "area of intended employment" as within the same MSA); *see also Employment and Training Administration Field Memorandum No. 48-94*, § 10 (May 16, 1994) (where the offered position, such as a computer consultant, involves multiple, unanticipated worksites, the employer's headquarters is an appropriate area of intended employment for labor certification purposes).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[3]

In pertinent part, section 203(b)(2)(A) of the Act provides immigrant classification to "members of the professions holding advanced degrees or their equivalent," whose services employers in the United States seek. The term "advanced degree" means "any United States academic or professional degree or a foreign equivalent degree above that of a baccalaureate." 8 C.F.R. § 204.5(k)(2). U.S. Citizenship and Immigration Services (USCIS) considers a U.S. bachelor's degree or a foreign equivalent degree followed by "at least five years of progressive experience in the specialty" the equivalent of a Master's degree. *Id.*

The beneficiary possesses a foreign, three-year Bachelor of Commerce degree and a foreign two-year Master of Business Administration degree. The primary issue is whether the beneficiary's Master's degree is a foreign equivalent degree to a U.S. Master's degree.

To qualify for a preference immigrant visa, a beneficiary must possess all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). The petition's priority date is the date the DOL (or any office within its employment service system) accepted the application for labor certification for processing. 8 C.F.R. § 204.5(d).

Here, the DOL accepted the ETA Form 9089 for processing on September 13, 2007. The DOL certified the application on July 16, 2008, and the petitioner filed the immigrant visa petition on September 4, 2008.

Eligibility for the Classification Sought

The DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available, and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i); 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983).

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[3] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

A United States baccalaureate degree generally requires four years of university education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). *Shah* involved a petition filed under section 203(a)(3) of the Act, 8 U.S.C. § 1153(a)(3), as amended in 1976. At that time, this section provided:

> Visas shall next be made available … to qualified immigrants who are members of the professions …

Congress added section 203(b)(2)(A) of the Act, 8 U.S.C. § 1153(b)(2)(A), which provides:

> Visas shall be made available … to qualified immigrants who are members of the professions holding advanced degrees or their equivalent …

Significantly, the statutory language before and after *Shah* is identical, but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (Oct. 26, 1990).

Congress is presumed to be aware of administrative and judicial interpretations when it adopts a new law incorporating sections of a prior law. *See Lorilland v. Pons*, 434 U.S. 575, 580-81 (1978). Congress therefore presumptively intended the second-preference equivalency provision to require a four-year bachelor's degree in accordance with *Shah* because Congress did not statutorily alter the agency's interpretation of the term "bachelor' s degree."

When the Federal Register published the final rule for the regulation at 8 C.F.R. § 204.5 in 1991, the Immigration and Nationality Service (the Service) responded to criticism that the regulation required an alien to have the minimum of a bachelor's degree and barred the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub.L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service noted that both the Act and its legislative history state that an alien must have at least a bachelor's degree.

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history … indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legaslative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree*.

56 Fed.Reg. 60897, 60900 (Nov. 29, 1991 (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding the equivalent of an advanced degree with anything less than a full baccalaureate degree (plus the requisite five years of progressive experience in the specialty). More specifically, a three-year bachelor's degree will not be considered to be "a foreign equivalent degree" of a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than "a foreign equivalent degree."[4] To have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is "a foreign equivalent degree" to a United States baccalaureate degree (plus the requisite five years of progressive experience in the specialty). 8 C.F.R. § 204.5(k)(2).

For classification as an advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of at least an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree" (plus evidence of five years of progressive experience in the specialty). For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." Without undermining Congress' visa classification scheme, we cannot conclude that the evidentiary standard for the more restrictive visa classification of advanced degree professional is less than the standard for a professional. Moreover, the commentary to the regulation for advanced degree professionals states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." 56 Fed.Reg. 30703, 30306 (July 5, 1991) (emphasis added). *Cf.* 8 C.F.R. § 204.5(k)(3)(ii)(A) (requiring aliens of exceptional ability to submit "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability") (emphasis added).

To establish that the beneficiary holds an advanced degree, the petitioner must submit "[a]n official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree" or "[a]n official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty." 8 C.F.R. § 204.5(k)(3)(i)(A),(B).

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[4] *Cf.* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining the "equivalence to completion of a college degree" as including a specific combination of education and experience for purposes of H-1B nonimmigrant visa classification). The regulations pertaining to the immigrant visa classification sought in this matter do not contain similar language.

The regulation at 8 C.F.R. § 204.5(k)(3)(i)(A) requires "a United States advanced degree or a foreign equivalent degree" in the singular. Thus, to qualify as an advance degree professional for second preference visa category purposes, the plain language of the regulation requires the petitioner to establish that the beneficiary received one degree that is the equivalent of a U.S. degree above that of a baccalaureate. *See* 8 C.F.R. § 204.5(k)(2) (defining the term "advanced degree" as "above that of baccalaureate").

The record shows that the petitioner submitted copies of the beneficiary's diplomas and marks sheets from in India. These official academic records show that awarded the beneficiary a Bachelor of Commerce degree in April 1993 after three years of study and a Master of Business Administration degree in May 1995 after two years of study. The record shows that the petitioner also submitted a copy of a post-graduate diploma from in India, indicating that the beneficiary successfully completed a one-year course in computer applications from July 1994 to June 1995.

In addition, the record shows that the petitioner submitted a total of three credentials evaluations. The first evaluation, which was dated December 3, 2000 from of described the beneficiary's Bachelor of Commerce degree from as "a three-year tertiary program of study." Considering the beneficiary's Bachelor of Commerce and Master of Business Administration degrees, the evaluation states that "collectively, these two (2) Degrees are equivalent to a Bachelor of Science in Business Administration from an accredited institution of higher education in the U.S." The evaluation acknowledged the beneficiary's post-graduate diploma and concluded that the beneficiary has the equivalent of a U.S. Bachelor of Science degree in Business Administration, "with additional concentration in computer applications." The evaluation therefore equated the beneficiary's post-graduate diploma with U.S. university-level coursework in computer applications.

In response to the acting director's May 24, 2011 Notice of Intent to Deny, the record shows that the petitioner submitted two additional credentials evaluations. A June 7, 2011 evaluation from Dr. Professor of Marketing at in the U.S., described the beneficiary's Bachelor of Commerce degree as the equivalent of three years of academic studies toward a U.S. Bachelor of Business Administration degree. Dr. described the beneficiary's Master of Business Administration degree, "by itself," as the equivalent of a U.S. Master of Business Administration degree with a concentration in Marketing. He found that the presence of a graduate-level research project on the beneficiary's transcript confirmed the post-baccalaureate nature of the beneficiary's Master's program and that the coursework the beneficiary completed "would satisfy the academic requirements for a master's-level degree equivalency in Business Administration" in the U.S.

Dr. also described the beneficiary's post-graduate diploma from as equivalent to bachelor's-level coursework in the U.S. He found that, together with the Bachelor of Commerce degree, the post-graduate diploma equaled a U.S. Bachelor of Science degree in computer information systems.

The third credentials evaluation is dated April 26, 2007 from This evaluation describes the beneficiary's Bachelor of Commerce degree as equivalent to three years of U.S. university study. It concludes that the beneficiary's Master of Business Administration degree is the equivalent of a U.S. MBA.

The acting director denied the petition on June 27, 2011. She found that "[t]he beneficiary lacks the mandatory educational requirement stated in the labor certification as his graduate degree is less than the United States-equivalent of the necessary full master's degree."

On appeal, the petitioner submits a July 21, 2011 evaluation, which the petitioner refers to as an "expert opinion," with supporting documents from Ph.D., Assistant Professor of Business at in the U.S. Dr. , like Dr. and Mr. concludes that the beneficiary's two-year Master of Business Administration degree equates to a U.S. MBA with a concentration in marketing. Dr. asserts that many U.S. universities admit students with three-year bachelor's degrees from India to their MBA programs, that the beneficiary meets the Master's degree equivalency criteria proposed by authors from the National Association of Foreign Student Advisors (NAFSA): Association of International Educators, and that a report from the Electronic Database for Global Education (EDGE) of the American Association of Collegiate Registrars and Admissions Officers (AACRAO) supports his conclusion.

USCIS may, in its discretion, consider statements from experts as advisory opinions. Where an opinion is not in accord with other information or is in any way questionable, however, USCIS is not required to accept the statement or may give it less weight. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988).

The credential evaluations that the petitioner submitted do not unanimously conclude that the beneficiary's Master of Business Administration degree from India constitutes a foreign equivalent degree to a U.S. MBA. The credentials evaluation from Ms. of concluded that the beneficiary's Indian MBA equated only to a U.S. bachelor's degree. The AAO therefore reviewed the EDGE report that AACRAO created and that Dr. referenced.

According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." *See* http://www.aacrao.org/About-AACRAO.aspx. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.*

The EDGE is "a web-based resource for the evaluation of foreign educational credentials." *See* http://edge.aacrao.org/info.php. Authors for the EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.[5] If placement recommendations are included, the Council Liaison works with the

[5] *See An Author's Guide to Creating AACRAO International Publications* available at

author to give feedback, and the publication is subject to final review by the entire Council. *Id.* USCIS considers the EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies. *See Confluence Intern., Inc. v. Holder,* 2009 WL 825793 (D.Minn. March 27, 2009); *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. Aug. 30, 2010); *Sunshine Rehab Services, Inc. v. USCIS*, 2010 WL 3325442 (E.D.Mich. Aug. 20, 2010) (all upholding USCIS's reliance on the EDGE in weighing credentials evaluations).

The EDGE's credential advice provides that a Bachelor of Commerce degree in India is comparable to two to three years of university study in the U.S. A Master of Business Administration degree in India, which requires completion of a three-year bachelor's degree for admission, is comparable to a U.S. Bachelor's degree, according to the EDGE. A post-graduate diploma, when issued by an accredited university or an institution approved by the All-India Council for Technical Education (AICTE) and when following a three-year bachelor's degree, represents attainment of a U.S. bachelor's degree, according to the EDGE.[6]

The AAO finds the EDGE's conclusion equating an Indian Master of Business Administration degree to a U.S. bachelor's degree more persuasive than the credentials evaluations of Mr. of and Drs. which all equated an Indian MBA to a U.S. MBA. The EDGE's opinion represents a peer-reviewed recommendation, rather than merely the opinion of an individual evaluator.

In his July 21, 2011 evaluation, Dr. claims that the EDGE supported his conclusion that an Indian MBA is a foreign equivalent degree to a U.S. MBA. Dr. states that the EDGE "does not offer a specific opinion on Master of Business Administration [d]egrees awarded by Indian universities." He analogizes Indian MBAs to Indian Master of Engineering degrees and includes

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http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx.

[6] The petitioner has not demonstrated that an accredited university or AICTE-approved institution issued the beneficiary's post-graduate diploma. The copy of the diploma and its corresponding transcript do not indicate that is an accredited university or an AICTE-approved institution. Rather, the transcript indicates that the Indian Department of Electronics & Accreditation of Computer Courses (DOEACC) accredited . The diploma and transcript also do not indicate whether admission to required a Bachelor's degree. In addition, the record does not establish that the beneficiary attended on a full-time basis. The transcript states that the beneficiary completed a one-year program in computer applications from July 1994 to June 1995. The beneficiary's post-graduate program, however, appears to overlap with his two-year, Indian MBA program, which transcripts show began in the fall of 1993 and ended in May 1995. The petitioner has not explained how the beneficiary attended a one-year, post-graduate program while simultaneously studying full-time for an MBA. This casts doubt on whether the post-graduate diploma reflects full-time, post-graduate education. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (the petitioner must resolve any inconsistencies in the record by independent, objective evidence).

online printouts from the EDGE equating Indian Master of Engineering degrees to U.S. Master degrees in engineering, based on either three- or four-year Indian bachelor's degrees.

The EDGE, however, provides credentials information specifically on "Master of Arts, *Business Administration*, Computer Management, Commerce or Science" degrees in India, finding them comparable to U.S. Bachelor's degrees. (emphasis added). The AAO finds that the EDGE addresses Indian MBAs and equates them to U.S. Bachelor's degrees. *See* http://edge.aacrao.org/country/credential/master-of-arts-or-commerce?cid=single (accessed February 28, 2013). Specifically, the EDGE states "Master of Arts, Business Administration, Computer Management, Commerce, Fine Arts, or Science represent attainment of a level of education comparable to a bachelor's degree in the United States."

Dr. also asserts that many accredited U.S. universities allow students with three-year bachelor's degrees from India to apply to MBA programs. He submits copies of website printouts showing that accept MBA applications from students with three-year bachelor's degrees from India. If the beneficiary's three-year bachelor's degree from India could allow him to obtain an MBA from a top-ranked U.S. business school, Dr. argues, then the beneficiary's Indian MBA, which also followed his three-year baccalaureate, should be considered a foreign equivalent degree to a U.S. MBA.

The acceptance of MBA applications from students with three-year bachelor's degrees from India by some U.S. colleges or universities does not establish the equivalence of the beneficiary's foreign graduate education to a U.S. MBA. In addition, the petitioner did not submit any evidence regarding the number of students with three-year bachelor's degrees from India who were accepted into U.S. MBA programs and/or who obtained U.S. MBAs. The AAO therefore does not find this argument persuasive.

Drs. argue that many accredited U.S. universities offer five-year, integrated programs of bachelor's- and master's-level studies leading to MBAs, as well as one-year MBA programs. Dr. provides copies of website printouts showing that offer five-year, integrated MBA programs, and website printouts from showing that these U.S. schools offer one-year MBA programs. Like the U.S. graduates of these five-year and one-year MBA programs, Drs. argue that the beneficiary's Indian MBA represents five years of university study. They assert that the beneficiary's Indian MBA is therefore a foreign equivalent degree to a U.S. MBA.

Drs. do not establish, however, that the beneficiary's coursework in India closely corresponds to the curricula in these U.S. five-year and one-year MBA programs. The AAO therefore does not find this argument persuasive.

Dr. also argues that, based on improvements in educational standards and accreditation in India, two respected credentials evaluators propose equating certain two-year, Indian Master's degrees that follow the completion of three-year, Indian Bachelor's degrees with U.S. Master's degrees. the authors of special reports on India for AACRAO's believe students with three-year Bachelor's degrees and two-year Master's degree from India with at least 50 percent in marks obtained from an institution accredited by the National Assessment and Accreditation Council (NAAC) possess the equivalent of a U.S. Master's degree. *See* "Three-Year Indian Undergraduate Degrees: Recommendations for Graduate Admission Consideration," *Admissions Wrap-Up*, NAFSA: Association of International Educators, Vol. 2, Issue 2, April 2005, pp. 5-7. Dr. argues that the beneficiary meets the authors' proposed criteria.

The AAO acknowledges the recommendations of Mr. and Mr. As indicated in the authors' article, however, the recommendations represent their individual opinions and do not reflect the view of NAFSA. Indeed, the authors admit that, "[g]iven the history of Indian higher education, many international admissions officers are not comfortable in making changes to their rationale and philosophy while reviewing applications from Indian students for admission to graduate programs." *See* "Three-Year Indian Undergraduate Degrees: Recommendations for Graduate Admission Consideration," *Admissions Wrap-Up,* p. 7. The AAO therefore finds the peer-reviewed, credentials opinion of AACRAO on the EDGE to be more persuasive than the individual opinions of Mr. and Mr.

In his brief, counsel cites a non-precedent, 2007 decision in which the AAO found a beneficiary with a three-year bachelor's degree and two-year Master's degree from India to possess a foreign equivalent degree to a U.S. Master's degree in physics. Because the AAO found the petitioner's credential evaluations and expert opinion persuasive in the 2007 case, counsel argues the AAO should similarly sustain the petitioner's appeal in the instant case.

The petitioner did not establish that the instant matter is factually similar to that case. The credentials evaluations and expert opinion in the 2007 case unanimously concluded that the beneficiary possessed a foreign equivalent degree to a U.S. Master's degree. In the instant case, the petitioner submitted a credentials evaluation that found that the beneficiary had only the equivalent of a U.S. bachelor's degree. The AAO therefore does not find its 2007, non-precedent decision persuasive in this case.

Moreover, the AAO's non-precedent decisions do not bind this Office in later cases. Rather, the AAO is bound by the Act, agency regulations, precedent decisions of the agency, and published decisions from the circuit court of appeals in the circuit where the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.,* 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the

Administrative Procedures Act, even when they are published in private publications or widely circulated).

Counsel also asserts that regional conventions of the United Nations Educational, Scientific and Cultural Organization (UNESCO) require the United States and its agencies to recognize the beneficiary's three-year Bachelor's degree as qualifying him for graduate study in the U.S., just as the degree qualifies him for graduate study in India. The UNESCO conventions legally bind the U.S., according to counsel.

Counsel's reliance on the UNESCO conventions is misplaced. UNESCO has six regional conventions and one interregional convention on the recognition of qualifications. A convention on the recognition of qualifications is a legal agreement between countries to recognize the academic qualifications of the other countries that have ratified the same agreement. While India has ratified one convention on the recognition of qualifications in the Asia and Pacific region, the United States has not ratified any of the UNESCO conventions on the recognition of qualifications. In an effort to create a single, universal convention, the UNESCO General Conference adopted a Recommendation on the Recognition of Studies and Qualifications in Higher Education in 1993. The United States was not a member of UNESCO from 1984 to 2002, and the Recommendation on the Recognition of Studies and Qualifications in Higher Education is not a binding legal agreement between UNESCO members to recognize academic qualifications. *See* http://www.unesco.org/education/studyingabroad/tools/convention.shtl (accessed February 28, 2013). The AAO therefore finds that the UNESCO conventions do not require USCIS or other U.S. agencies to recognize the beneficiary's three-year bachelor's degree as qualifying him for graduate study in the U.S.

Therefore, the AAO finds that the petitioner has not demonstrated that the beneficiary qualifies as an advanced degree professional based on possession of a U.S. advanced degree or a foreign equivalent degree.

As discussed below, the labor certification does not allow for the alternative of a U.S. baccalaureate degree or foreign equivalent degree and five years of progressive experience in the specialty to meet the requirements of the offered position. Further, the record does not support a finding that the beneficiary would have possessed this experience in addition to the experience required for the position offered. The AAO therefore finds that the beneficiary does not qualify for preference visa classification as an advanced degree professional under section 203(b)(2) of the Act.

Qualifications for the Job Offered

Relying in part on *Madany v. Smith*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the

> domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir.1983). The court relied on an amicus brief from the DOL that stated :

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(5) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

Id. at 1009 (emphasis added). The Ninth Circuit, citing *K.R.K. Irvine*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a *de novo* determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu*, 736 F.2d at 1309.

The key to determining the job qualification is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F.Supp. 829, 833 (D.D.C.1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification, must involve reading and applying the plain language of the alien labor certification application form. *Id.*, at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that the DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

The position's minimum requirements include a "Master's" degree in "[b]usiness [a]dministration" or a foreign equivalent degree, plus 48 months of experience in the job offered. ETA Form 9089 in Part H.14 also requires "1 year of experience in: Java, Servlet, Web Logic, Oracle, .NET, ASP.NET,

VB.NET, C, JDBC, ADO.NET, and SQL Server. Travel must." [sic]. In Part H.8. of the labor certification form, the petitioner indicated that it would not accept an alternate combination of education and experience for the position.

Thus, the plain language of the labor certification states that the offered position requires a U.S. Master's degree or a foreign equivalent degree in business administration, plus 48 months of experience in the job offered. Again, any alternate combination of education and experience is unacceptable.

As discussed above, the AAO has determined that the petitioner has not established that the beneficiary possesses a U.S. MBA or a foreign equivalent degree. The petitioner has therefore failed to demonstrate that the beneficiary meets the education requirements for the offered position as set forth on the labor certification. Even if the beneficiary qualified for the alternative advanced degree equivalency through a bachelor's degree plus five years of progressive post-baccalaureate experience, the beneficiary would not meet the minimum education requirements of the labor certification, as the labor certification requires a master's degree or a foreign equivalent degree and the petitioner indicated that it would not accept an alternate combination of education and experience.

Citing *Snapnames.com, Inc. v. Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006), counsel asserts that "USCIS's interpretation of the petitioner's educational requirement should be informed by [the] petitioner's intent, to the extent possible, and not on USCIS's understanding of a similar but inapplicable regulatory language." Citing *Chintakuntla v. INS*, No. C99-5211 MMC (N.D. Calf., May 4, 2000), counsel also argues that USCIS must seek clarification from the petitioner regarding an ambiguous provision on the labor certification. In addition, counsel argues that "USCIS does not have the authority or expertise to impose its strained definition of MBA or foreign equivalent on that term as set forth in the labor certification," relying on *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir.1993).

First, the AAO notes that the federal court decisions that counsel cites do not bind this Office in this case. As discussed previously, the AAO is bound by the Act, agency regulations, precedent decisions of the agency, and published decisions from the circuit court of appeals in the circuit where the action arose. *See, e.g., Ashkenazy Property Management Corp.*, 817 F.2d at 75. Here, federal courts in California and Oregon issued the decisions that counsel cites. As the action in this case arises in the area of intended employment of New Jersey, the federal court decisions from California and Oregon do not bind the AAO in this matter.

Moreover, counsel's citation to *Snapnames.com* does not support the petitioner's argument. In *Snapnames.com*, the labor certification required four years of college and a "B.S. or foreign equivalent." The beneficiary had a three-year degree and membership in the [redacted] The court determined that the word "equivalent" in the employer's educational requirements was ambiguous and that, in the context of skilled worker petitions where there is no statutory educational requirement, USCIS must defer to the employer's intent. *Id.* at *14.

In professional and advanced degree professional cases, however, where the alien is statutorily required to hold at least a bachelor's degree or "a foreign equivalent degree," USCIS properly concluded that a single foreign degree or its equivalent is required. *Id.* at *17, 19. Thus, the court concluded that, where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id. at *7.*

In the instant case, the petitioner is not seeking classification as a skilled worker. Rather, the petitioner seeks second-preference classification as an advanced degree professional. Under *Snapnames.com*, therefore, USCIS is not required to defer to the employer's intent where the plain language of the requirements does not support that intent. Like the regulation for a professional worker at issue in *Snapnames.com*, the applicable regulation in the instant case for an advanced degree professional requires "a foreign degree equivalent." *See* 8 C.F.R. § 204.5(k)(3)(i)(A) (requiring an "advanced degree or a foreign degree equivalent"). Thus, because the petitioner is not seeking skilled worker classification, counsel's citation to *Snapnames.com* does support his argument that USCIS must consider the petitioner's intent regarding its educational requirements. Rather, because the petitioner seeks advanced degree professional classification, which plainly requires an "advanced degree or a foreign degree equivalent," *Snapnames.com* supports USCIS's finding that the petitioner's offered position requires an advanced U.S. degree or a single foreign degree that equates to one.

Similarly, counsel's reliance on *Chintakuntla* is misplaced. In *Chintakuntla*, a class-action case, the court required USCIS's predecessor agency, the Immigration and Nationality Service, to reconsider denials of petitions where the labor certifications required a bachelor's degree and at least five years of experience for the offered position. *See* 65 Fed. Reg. 128 (July 3, 2000). The court faulted the Service's interpretation of the phrase "five years of progressive experience," which neither statute nor regulation, at that time, defined as requiring five years of post-baccalaureate experience.

In the instant case, the interpretation of the phrase "five years of progressive experience" is not at issue. The petitioner stated on the labor certification that it would not accept an alternate combination of education and experience to meet the offered position's requirements of a Master's degree and 48 months of experience in the offered position. *See* ETA Form 9089, Part H.8. In addition, the petitioner has failed to establish that the beneficiary had at least five years of progressive experience. Therefore, the court's decision in *Chintakuntla* is not applicable to this case.

Finally, the AAO also finds *Tovar v. U.S. Postal Service* inapplicable to this matter. In *Tovar*, an alien challenged a U.S. Postal Service regulation that barred the agency's employment of temporary resident aliens. *Tovar*, 3 F.3d at 1272. The court remanded the case to determine whether the postal service exceeded its authority in issuing the regulation. *Id.*, at 1271.

Unlike the postal service in *Tovar*, which both parties acknowledged had no expertise in immigration law, USCIS has significant expertise in immigration law and has been authorized by Congress to administer the Immigration and Nationality Act. Federal courts must therefore defer to USCIS's reasonable interpretation of the Act. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Moreover, as discussed previously, federal courts have

upheld USCIS's authority to determine beneficiaries' qualifications for immigrant classifications and for their offered positions. *See Madany v. Smith*, 696 F.2d at 1012-13; *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d at 1309, *citing K.R.K. Irvine, Inc. v Landon*, 699 F.2d at 1008. The AAO therefore finds that USCIS has both the authorization and the expertise to interpret the educational requirements for an advanced degree professional.

In summary, the AAO finds that the petitioner has not demonstrated that the beneficiary holds a U.S. Master of Business Administration degree or a foreign equivalent degree as set forth on the labor certification and as required for second-preference classification as an advanced degree professional. Therefore, the AAO finds that the beneficiary does not qualify for preference visa classification under section 203(b)(2)(A) of the Act as an advance degree professional and does not meet the qualifications stated on the labor certification.

Beyond the decision of the director, the petitioner has also not established that the beneficiary possesses the minimum employment experience for the offered position set forth on the labor certification. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. at 159; *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany* v. *Smith,* 696 F.2d at 1015; *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d at 1009; *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey,* 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires 48 months of full-time experience in the offered position. On the labor certification, the beneficiary claims to qualify for the offered position based on approximately 11 years of experience as of the petition's priority date as a programmer analyst and computer programmer. The beneficiary states that he worked as programmer analyst from May 1, 1996 to July 31, 2002 for [redacted] in the [redacted] from August 1, 2002 to September 30, 2003 for [redacted] Massachusetts; from October 1, 2003 to June 5, 2006 for [redacted] Illinois; and from June 6, 2006 to September 22, 2006 for [redacted] Illinois. The beneficiary also states that he has worked for the petitioner as a computer programmer since September 27, 2006.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(g)(1). The petitioner has submitted letters from purported former employers of the beneficiary, including [redacted] The letter from [redacted] however, fails to describe the beneficiary's experience there as a programmer analyst in accordance with the regulation at 8 C.F.R. § 204.5(g)(1). Thus, the only two acceptable letters from the beneficiary's purported former employers are from [redacted] Together, these letters establish only about 13 months of experience.

The evidence in the record therefore does not establish that the beneficiary possessed the required 48 months of experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary meets the minimum employment experience requirements for the offered position.

The AAO may deny an application or petition that fails to comply with the technical requirements of the law even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

In addition, the petitioner has failed to establish its continuing ability to pay the proffered wage as of the priority date. *See* 8 C.F.R. § 204.5(g)(2).

USCIS records indicate that the petitioner has filed 96 petitions since December 18, 2006, including 85 Form I-129, Petitions for Nonimmigrant Workers, and 11 I-140 immigrant visa petitions, including the instant petition. The petitioner must demonstrate its ability to simultaneously pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence or until the petition was denied. *See* 8 C.F.R. § 204.5(g)(2). Further, the petitioner must pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.

The evidence in the record does not establish the priority date, proffered wage or wages paid to each immigrant visa beneficiary; whether any of the other petitions have been withdrawn, revoked, or denied; or whether any of the other beneficiaries have obtained lawful permanent residence. Thus, the petitioner has not established its continuing ability to simultaneously pay the proffered wage to the beneficiary, and the proffered and prevailing wages to the beneficiaries of its other petitions.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.